OMB

OLC 75-1037/a

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

Mr. James M. Frey, Assistant Director
for Legislative Reference
Office of Management and Budget
Washington, D. C. 20503

27 JUN 1975

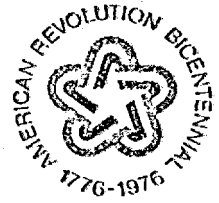
Attention: Mr. William V. Skidmore

Dear Mr. Skidmore:

This is in response to your request for the views of the Central Intelligence Agency on H. R. 2635, "To amend the Privacy Act of 1974." The bill would alter section 3(d)(2)(B)(i) of the Act, regarding an individual's right to correct personal information held by Government agencies, and would also strike section 3(j)(1). This section authorizes the Director of Central Intelligence to promulgate rules exempting any system of CIA records from certain requirements of the Act. I will confine my comments to the proposed deletion of this partial CIA exemption.

In drafting the Privacy Act, Congress recognized that "certain areas of Federal records are of such a highly sensitive nature that they must be exempted" (House Report 93-1416). Accordingly, Congress exempted systems of records "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" [subsection (k)(1)], and Central Intelligence Agency records [subsection (j)(1)] from portions of the Act. Sections of the Act which do apply to this Agency restrict the dissemination of records to those for specific enumerated purposes, require it to maintain a listing of each disclosure of a record for at least five years, and publish annually in the Federal Register a general description of our systems of records concerning American citizens or permanent resident aliens.

The basic mission of this Agency is to provide our nation's policy-makers with the best possible intelligence on foreign developments and threats. The system of records established in the Agency is designed to support this mission. Our ability to provide accurate and current intelligence to the President, the National Security Council, and to the Congress depends heavily upon the acquisition and maintenance of productive sources and effective methods of collection and analysis. Preservation of these sources and methods is absolutely dependent on their secrecy. Technical collection efforts can often be easily nullified if the target country is aware of the collection effort. And, of course, human sources will refuse further cooperation if they believe there is a substantial danger that their cooperation will be revealed. I believe



it was because of this essential secrecy that Congress, in the National Security Act of 1947, as amended (50 U.S.C. 403) directed that:

> "The Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure."

Although some CIA information can be protected by the section (k)(1) exemption for national defense or foreign policy information, this exemption would not fully protect Intelligence Sources and Methods information contained in the Agency's system of records. An intelligence document can reveal sources and methods and warrant protection even though the substantive information conveyed does not jeopardize the national defense or foreign policy. An example may help explain this. A and B, U. S. citizens, attend a scientific conference abroad of foreign intelligence interest to the United States. A voluntarily provides the Agency confidential information on the conference and includes information concerning B, or a foreign asset reports on the conference and includes information on A and B. Disclosure to B of the information about him in many cases would reveal A or the foreign asset as the confidential source of the information.

In summary, H. R. 2635, by striking the Agency's exemption from certain requirements of the Privacy Act, would jeopardize the Intelligence Sources and Methods which are vital to the Agency's ability to fulfill its unique mission. I must, therefore, oppose the bill.

Sincerely,

SIGNED

George L. Cary
Legislative Counsel

Distribution:
Orig - Addressee
1 - OGC
1 - DDA
1 - OLC Subject (OMB)
1 - OLC Chrono
1 - OLC leg file
1 - DFM Chrono
OLC: DFM: cg (19 Jun 75)

OMB

OLC 75-1035/a

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

27 JUN 1975

Mr. James M. Frey, Assistant Director
for Legislative Reference
Office of Management and Budget
Washington, D. C. 20503

Attention: Mr. William V. Skidmore

Dear Mr. Skidmore:

This is in response to your request for our views on the Department of Justice's draft bill concerning the dissemination and use of criminal justice information. The Central Intelligence Agency is strongly committed to the underlying objective of the proposed legislation which is to protect the right of privacy of citizens of the United States.

It is the position of this Agency that the Central Intelligence Agency is not a "criminal justice agency." However, we believe that the definition of "criminal justice agency" in the draft bill should be clarified to avoid any question of this fact in that legislation. If the Central Intelligence Agency were considered to be within that definition, it would be subject to requirements in conflict with its statutory charter. As a non-criminal justice agency, however, the Agency's access to important foreign intelligence information would be seriously impaired by the bill.

It has been ascertained in discussions with the Department of Justice that it was not intended to characterize the Central Intelligence Agency as a "criminal justice agency." This intent is consistent with and indeed mandated by the proscription of section 102(d)(3) of the National Security Act of 1947:

> ... That the Agency shall have no police, subpoena, law-enforcement powers, or internal-security functions ...

The Central Intelligence Agency's scope of authority is limited to foreign intelligence matters; it is definitely not a criminal justice agency.

There is, however, considerable ambiguity in the definition of "criminal justice agency" in section 102(6) of the bill. For instance, while the Agency's mission is not the detection of criminal offenses as such, foreign intelligence information sometimes has a bearing on criminal conduct, e.g., international narcotics trafficking or foreign terrorist activities. Thus, the language of

sections 102(5) and 102(6) could give rise to the argument that this Agency is a "criminal justice agency" to the extent that it obtains information relating to the "detection of ... criminal offenses." I strongly recommend that the draft be amended to make clear that the Central Intelligence Agency is not a "criminal justice agency." (Section I of the attached memorandum discusses the necessity for this clarification in more detail.)

While the Central Intelligence Agency is not to be considered a criminal justice agency, as a non-criminal justice agency under the bill it would be confronted with requirements which could impinge upon its essential responsibilities by barring Agency access to important foreign intelligence information.

The dissemination of foreign intelligence is a principal statutory function of the Central Intelligence Agency. Section 102(d)(3) of the National Security Act of 1947 imposes on the Agency a duty

> ... to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities ...

Moreover, section 102(e) of the National Security Act of 1947 provides:

> ... To the extent recommended by the National Security Council and approved by the President, such intelligence of the departments and agencies of the Government ... relating to the national security shall be open to the inspection of the Director of Central Intelligence, and such intelligence as relates to the national security and is possessed by such departments and other agencies of the Government ... shall be made available to the Director of Central Intelligence for correlation, evaluation, and dissemination ...

Certain provisions of the draft bill would impinge on this responsibility by preventing the Agency from obtaining foreign intelligence information in cases where such information includes items defined in section 102 as "criminal justice information." For example, the limitations in sections 204, 206(a), and 201(d) would preclude Agency receipt of information held by foreign and domestic criminal justice agencies concerning the criminal activities of a foreign terrorist. I recommend that the draft be appropriately modified to take into account the occasional necessity of disseminating to foreign intelligence agencies material which section 102 defines as "criminal justice information" and the need to protect such information in their possession. (Section II of the attached memorandum discusses in greater detail the problems that the Agency would be confronted with under the draft bill as a non-criminal justice agency.)

I would like to propose for your consideration the amendments to the draft bill set forth in section III of the attached memorandum. I believe they would satisfy the above-mentioned considerations while preserving the intent and objectives of the legislation.

Sincerely,

SIGNED

[redacted] STAT

Acting Legislative Counsel

Distribution:
Orig - Addressee
1 - OMB Liaison
1 - HR 61 file
1 - OLC Chrono
1 - WPB Chrono
OLC: WPB: cg (26 Jun 75)

MEMORANDUM

SUBJECT: Department of Justice Draft Bill on Criminal Justice Information

Section I

1. The regulatory provisions proposed in the draft bill would apply to certain kinds of information collected or compiled by "criminal justice agencies." These provisions would apparently extend to information from foreign sources, concerning foreign citizens and relating to conduct made criminal under foreign laws. The term "criminal justice agency" is defined in section 102(6), inter alia, as an agency which performs "criminal justice activities." The term "criminal justice" is defined in section 102(5) as referring "to the activities of a criminal justice agency relating to protection against, detection of, or investigation of criminal offenses ...." (emphasis added).

2. The foreign intelligence mission of the Central Intelligence Agency is not directed at the detection of criminal offenses as such; yet in its pursuit, information is sometimes obtained which has a bearing on criminal conduct, such as international narcotics trafficking or foreign terrorist activities. The definitions of "criminal justice" and "criminal justice agency" in sections 102(5) and 102(6) respectively are ambiguous and could give rise to an argument that the Central Intelligence Agency is a criminal justice agency to the extent that it gathers information relating to the "detection of ... criminal offenses" in connection with such matters.

3. The Central Intelligence Agency is not a criminal justice agency. It was established by the National Security Act of 1947 to provide the President and his policy advisers with foreign intelligence information. In addition, that Act provides:

> ... That the Agency shall have no police, subpoena, law-enforcement powers, or internal-security functions ... (50 U.S.C. 403).

4. There are at least three reasons why the Central Intelligence Agency is not a "criminal justice agency."

(a) The designation of the Central Intelligence Agency as a "criminal justice agency" would be contrary to existing law and efforts within Congress and the Executive branch to insure that all legislation clearly states that this Agency has no law-enforcement or criminal justice purpose.

(b) As a "criminal justice agency," the Central Intelligence Agency would be subject to the regulatory provisions of Title 2 of the draft concerning the collection, dissemination, and use of criminal justice information by criminal justice agencies and the provisions for the administration and enforcement of these provisions by the Commission created in Title 3. Some of these provisions would conflict with the Director's statutory obligation to protect Intelligence Sources and Methods (50 U.S.C. 403); with the Agency's principal statutory duty to correlate and evaluate foreign intelligence and to provide for its appropriate dissemination within the Government using where appropriate existing agencies and facilities (50 U.S.C. 403); and with the Agency's general exemption from provisions of any other law which would require the publication or disclosure of Agency organization, functions, or personnel (50 U.S.C. 403). Among the provisions which raise potential conflicts are the following:

--Sections 204 and 206(a), which provide for the exchange, dissemination and use of criminal justice information for non-criminal justice purposes, would preclude the dissemination of foreign intelligence information to appropriate domestic and foreign consumers where such intelligence contained "criminal justice information."

--Section 204(c), which requires non-criminal justice recipients of arrest record or criminal record information to notify the subject individual, could result in alerting foreign intelligence subjects of the Agency's interest in their activities.

--Section 208, which grants the subject individual (presumably including foreign citizens) access to arrest and criminal record information for personal inspection, could under given circumstances result in betraying this Agency's interest in a foreign intelligence subject or in compromising a sensitive liaison relationship with a foreign service.

--Section 209(b)(2), which would require the identifying and recording of the personnel with access to criminal justice intelligence information within an agency to which such information has been disseminated, could result in disclosing the identities of covert Agency officers.

--Section 302(a)(3), which empowers the "Commission on Criminal Justice Information" to investigate allegations of non-compliance with the Act, could result in Commission access to the most sensitive Intelligence Sources and Methods at the prompting of each allegation of non-compliance.

--Section 302(a)(4) would require the Agency to provide the Commission all information necessary to compile a public directory of "criminal justice information systems" identifying their nature, purpose, and scope. This section could result in the compromise of Intelligence Sources and Methods to the extent that it requires disclosure of Agency holdings on, or interest in, a foreign intelligence subject.

(c) Application to the Central Intelligence Agency of the requirements of Title 2 whenever foreign intelligence information pertains to criminal conduct would undermine the Agency's essential function of gathering, evaluating, correlating, and disseminating foreign positive intelligence in support of the foreign policy-making process. In order to comply with the Act, the Agency would be required to analyze foreign intelligence information against criminal law standards and arrange its information systems and the pattern of intra-Agency intelligence dissemination according to criminal justice values which may be irrelevant to and indeed impede the foreign intelligence process.

5. It is strongly recommended that section 102(5) of the draft bill be amended to make clear that foreign intelligence collection is not a criminal justice activity.

Section II

1. The Central Intelligence Agency is not a criminal justice agency. As a non-criminal justice agency, however, the Agency's access to important foreign intelligence information would be seriously impaired by the draft bill.

2. The Central Intelligence Agency has no general interest in obtaining criminal justice information per se. In support of the Director's position as the President's principal foreign intelligence advisor, this Agency must have access to information characterized in the draft bill as "criminal justice information" where it pertains to a foreign intelligence subject. Indeed, section 102(e) of the National Security Act of 1947 provides:

> ... To the extent recommended by the National Security Council and approved by the President, such intelligence of the departments and agencies of the Government ... relating to the national security shall be open to the inspection of the Director of Central Intelligence, and such intelligence as relates to the national security and is possessed by such departments and other agencies of the Government ... shall be made available to the Director of Central Intelligence for correlation, evaluation, and dissemination ...

Moreover, section 102(d)(3) of the National Security Act of 1947 imposes on the Agency the duty

> ... to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities ....

It is conceivable under given circumstances that the Agency would require access to any one of the five classes of information characterized as "criminal justice information" in the bill. This is especially true because each class could include information from foreign sources, concerning foreign citizens and relating to conduct made criminal under foreign laws. The limitations in sections 204 and 206(a) on the collection, dissemination, and use of criminal justice information for non-criminal justice purposes would preclude Agency receipt of foreign intelligence information held by domestic agencies and, by implication of section 201(d), held by foreign governments where such information falls within the definition of "criminal justice information" in the bill. Such restrictions would impinge upon the Agency's statutory responsibilities referred to above.

3. It is noted that section 205(b) would permit non-criminal justice agencies to use criminal justice information in screening applicants or for approving or reviewing security clearances. The Central Intelligence Agency may also wish to obtain criminal justice information on individuals who are being considered as possible intelligence sources or for operational purposes without initially notifying the individuals under consideration.

4. In those cases where the Agency would be able to obtain criminal justice information under sections 204(a) or (b), it would be required to notify the subject of such records under section 204(c). This notification could result in betrayal of Agency interest in a foreign intelligence subject.

5. It is strongly recommended that the draft bill be appropriately modified to take into account not only the need for material defined in the bill as "criminal

justice information" by foreign intelligence agencies, but also the need to protect such information in their possession and in some cases protect the fact that they have sought it or have it.

Section III

1. It is believed that the suggested amendments below would satisfy the considerations and statutory conflicts referred to in sections I and II of this memorandum, while preserving the intent and objectives of the legislation.

2. Proposed Amendment to H. R. 61:

(a) Strike section 102(5) and insert in lieu thereof the following:

> --Section 102(5) "Criminal justice" refers to the activities of a criminal justice agency relating to protection against, detection of, or investigations of criminal offenses as such, or to the apprehension, detention, pretrial release, posttrial release, prosecution, defense, correctional supervision or rehabilitation of accused persons or criminal offenders, adjudication of a charge, or processing requests for executive clemency, but shall not refer to foreign intelligence collection activities where undertaken by an agency of the United States authorized to conduct such activities.

(b) Insert after section 204(i) the following new section:

> (j) In the interests of promoting all-sources intelligence production, and in order further to implement sections 102(d)(3) and 102(e) of the National Security Act, as amended, information defined in section 102 of this Act as "criminal justice information" may be made available to the Director of Central Intelligence as directed by the National Security Council, where necessary for foreign intelligence purposes.

(c) Insert after section 103(b)(8) the following new section:

> (9) information relating to foreign intelligence sources and methods designated for protection from unauthorized disclosure pursuant to 50 U.S.C. 403.